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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
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Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149

COMMENTS OF AT&T CORP. ON SECTION 272(e)(4)

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COMMENTS OF AT&T CORP. ON SECTION 272(e)(4)

Pursuant to the Commission's Public Notice of April 3, 1997, AT&T Corp. ("AT&T") respectfully submits these comments on the challenges made by Bell Atlantic and Pacific Telesis to the Commission's interpretation of section 272(e)(4) of the Communications Act of 1934, as amended. See 47 U.S.C. § 272(e)(4).

BACKGROUND

In the First Report and Order, ¶ 261, the Commission concluded that section 272(e)(4) is not a grant of authority that would override the requirements of sections 271(a) and (b), and 272(a), and permit a BOC to provide its affiliates and other carriers with the interLATA services and facilities that these provisions of the Act prohibit. Instead, the Commission held that "section 272(e)(4) is intended to ensure the nondiscriminatory provision of services that the BOCs are authorized to offer directly, and not through an affiliate, such as those services exempted from section 271 prior to the sunset of the separate affiliate requirement." Id.

Bell Atlantic and Pacific Telesis petitioned for review of that Order, and sought summary reversal of the Commission's interpretation of section 272(e)(4). They asserted that section 272(e)(4) permits a BOC to customize, engineer, build, and operate a long-distance network for its interLATA affiliate and to provide long-distance service to other carriers -- and

that they had been planning to do precisely that until the Commission issued the First Report and Order.[1]

In response, the Commission asked the Court to defer ruling on the request for summary reversal, and instead to remand the case to the Commission for additional consideration and then deny the two RBOCs' motion as moot.[2] However, the Court remanded the case only after first denying the RBOC motion on the merits, and expressly holding the two RBOCs' showing insufficient to justify summary reversal.[3] The Commission then initiated this proceeding, and requested comments on an expedited basis.

DISCUSSION

The Commission's First Report and Order had it right -- and even one RBOC agrees. See First Report and Order, ¶ 260. The arguments of Bell Atlantic and Pacific would, if adopted, nullify the provisions of the 1996 Act that prohibit the BOCs from directly providing long-distance telephone services to their affiliates or to other carriers. According to the two RBOCs, section 272(e)(4) is a "grant of authority" that somehow supersedes section 272's structural separation and non-discrimination provisions and that permits a BOC to construct and operate a long-distance network for its affiliate if it also offers long-distance service to other carriers on a wholesale basis. At the same time, these RBOCs now concede that section 272(e)(4) does not supersede the provisions of section 271, and that they thus would first have to obtain authorization from the Commission to provide in-region services before providing such

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[1] See Bell Atlantic v. FCC, No. 97-1067, Motion of Bell Atlantic and Pacific Telesis for Summary Reversal or for Expedition (D.C. Cir. filed Feb. 11, 1997) ("RBOC Motion").

[2] See id., Motion of Federal Communications Commission for Remand to Consider Issues (D.C. Cir. filed Feb. 25, 1997) ("FCC Motion").

[3] See id., Order (D.C. Cir. Mar. 31, 1997).

services and facilities to their affiliates. This self-contradictory position is foreclosed by the language, structure, and purpose of the Act.

1. **Statutory language.** First, the two RBOCs' construction of section 272(e)(4) would permit them to do what other provisions of the Act expressly prohibit. Section 271(a) prohibits BOCs from providing any in-region landline interexchange service in any manner prior to FCC approval, and sections 272(a) and 272(b) prohibit BOCs even after such approval from providing such services directly for at least three years, requiring instead that such services be provided, if at all, only though a separate affiliate. The two RBOCs' assertion that they may nonetheless directly provide interLATA services squarely contravenes those provisions.

Indeed, their construction of the relationship between section 272(e)(4) and sections 271 and 272(a) is self-contradictory. If the purportedly literal reading of section 272(e)(4) means that it is a "grant of authority" that permits the BOCs to provide services and facilities to other carriers directly -- i.e., if 272(e)(4) trumps 272(a) -- there is no apparent reason why it would not also override the requirements of section 271 and permit the BOCs to engage in such activities without receiving prior in-region authorization from the Commission. Moreover, contrary to their assertions to the Court of Appeals, one of the two RBOCs previously advanced the patently untenable claim that section 272(e)(4) overrode section 271 as well.[4]

In response to this difficulty, the two RBOCs replied in the Court of Appeals that their interpretation of section 272(e)(4) did not conflict with 272(a) at all, and therefore that

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[4] Compare PacTel Oct. 18, 1996, ex parte at 1 (section 272(e)(4) "create[d] an exception to the general interLATA limitation of section 271") with Bell Atlantic v. FCC, No. 97-1067, Reply of Bell Atlantic and Pacific Telesis, p. 6 (D.C. Cir. filed February 28, 1997) (section 272(e)(4) "cannot be read as an exception to section 271's authorization requirement") ("RBOC Reply").

section 272(e)(4) did not need to be read to override section 272(a) in order to sustain their position. They asserted that section 272(a) is inapplicable to their proposed arrangements because it applies by its terms only when a BOC engages in the "origination" of interLATA services, and the provision of wholesale services and facilities to other carriers, they asserted, does not constitute the "origination" of service. See RBOC Reply, p. 5.

This argument is frivolous. As the Commission points out in the Notice, section 271 likewise talks of "originating" long-distance service. Section 271(a) prohibits any BOC or BOC affiliate from "provid[ing] interLATA services except as provided in this section." Sections 271(b)(1) and 271(b)(2) then permit a BOC to provide "interLATA services originating in any of its in-region States" once it receives Commission approval, and to provide "interLATA services originating outside its in-region States" at any time. If the BOCs were correct that the provision of wholesale services does not involve "originating" interLATA services, then their proposed arrangements would not be covered by section 271(b) and would be prohibited by section 271(a) even after Commission approval -- a position which no party, and certainly not the two RBOCs, has endorsed.

Contrary to the two RBOCs' argument, the terms "originating" and "origination" in sections 271 and 272 are not used in the Act to reflect any distinction between the provision of service at retail and the provision of service at wholesale. A carrier "originates" service whether it provides it at retail or wholesale. Instead, the terms are used because (1) Congress wished to distinguish between in-region service and out-of-region service based principally on the point of origination, see sections 271(b)(1), 271(b)(2), and (2) Congress wished to distinguish between "originating" service and "termination," see sections 271(b)(4), 271(j), 272(a)(2)(B). In each instance, the distinctions depend solely on whether the user or subscriber to the

interexchange service is located in that BOC's region, and not on a distinction between wholesale and retail services.

The two RBOCs' contention that section 272(e)(4) can somehow override section 272(a) but not section 271 is thus pure sophistry. Plainly, it does neither. Indeed, section 272(e)(4) is entirely consistent with these other provisions. By its clear terms, it permits the BOC to provide interLATA services and facilities to affiliates only if the BOC likewise offers those same services and facilities to other carriers on non-discriminatory terms. Thus, section 272(e)(4) presupposes that, and thus applies only when, the BOC is authorized to provide services to other carriers. And sections 271(a) and 272(a) in turn address the circumstances in which the BOC may lawfully satisfy that condition. Those sections categorically prohibit a BOC, even after its section 271 application is granted, from itself originating any interLATA services other than out-of-region services, most incidental services, and previously authorized services (see section 272(a)(2)(B)).

Section 272(e)(4) thus does not create a fourth exception to the prohibition of 272(a) (much less one which, like the BOCs' proposed reading, would swallow virtually the entirety of the rule), but instead establishes the conditions under which the authorized services may be provided to an interLATA affiliate. Particularly because the Act requires the BOCs to operate highly regulated firms that provide services pursuant to numerous independent statutory and regulatory limitations, there is no basis for construing a conventional non-discrimination provision like section 272(e)(4) to sweep away all other independent restrictions. Indeed, it is especially clear that section 272(e)(4) is not a superseding "grant of authority" because, as the Notice observes, it addresses a BOC's provision of "interLATA or intraLATA" services, and a BOC needs no grant of federal statutory authority to provide intraLATA services.

The two RBOCs nevertheless claimed to the Court that the "plain language" of section 272(e)(4) shows that it has precisely this effect, because it uses the terms "may" (which, they pointed out, is the language of permission) and "any service." Their emphasis on the uses of these words, however, was as ironic as it is unfounded. Section 272(a)(1) expressly provides that a BOC "may not provide any service described in paragraph (2)" (i.e., any interLATA services except for the three limited categories the BOCs are authorized to provide directly) except through a separate affiliate. See 47 U.S.C. § 272(a)(1) (emphasis added). The two RBOCs would constructively amend that provision to provide only that BOCs "may not provide any retail service," so that they could function as wholesalers to other carriers and thus provide services to their affiliate under section 272(e)(4). But that would radically rewrite the statute.

In fact, Congress' use of the word "may" in no way supports the two RBOCs' reading. The word "may" was used by Congress for the obvious reason that nothing requires a BOC to provide any services or facilities to its affiliate in the first place. Congress' use of the word hardly establishes that it intended section 272(e)(4) to conflict with, and override, the other express provisions of sections 271 and 272.

Nor does section 272(e)(4)'s use of the term "any" services rather than "mention[ing] the specific services" to which it currently applies (see RBOC Motion, p. 10), provide any support for the two RBOCs' claim. Section 272(e)(4) uses the word "any" because it is a non-discrimination requirement that applies to "any" services the BOC may lawfully offer. Moreover, Congress could not simply have "mentioned specific services" for the obvious reason that the composition of interLATA services that a BOC may lawfully provide directly will change over time. For example, while the requirement that the BOC provide interLATA information services only through a separate affiliate will sunset, unless extended by the

Commission, "4 years after the date of enactment of the Telecommunications Act of 1996," § 272(f)(2) (emphasis added), the separate affiliate requirement for manufacturing activities and interLATA telecommunications services sunsets, unless extended by the Commission, "3 years after the date such [BOC] . . . is authorized to provide [in-region] interLATA" services -- a date which is now later than the date for the sunset of the separate affiliate requirement for interLATA information services.

2. The Act's structure. The two RBOCs' construction is likewise inconsistent with the structure of section 272. Section 272(a) defines which interLATA services a BOC may directly provide, while section 272(e) defines how BOC services may be provided to its affiliates and unaffiliated entities so as to promote equal treatment. If Congress had wished to create an additional (and enormous) exception to the general prohibition on direct provision of interLATA services by BOCs, it would have placed that exception with the others in section 272(a).

However, because section 272(e)(4) is instead merely a non-discrimination provision, it was placed with three other non-discrimination provisions. See 47 U.S.C. §§ 272(e)(1-3). It merely establishes that insofar as a BOC affiliate is obtaining interLATA or intraLATA services that a BOC is authorized itself to provide to its retail customers, other carriers must be allowed to obtain the same service at the same rates and under the same terms and conditions as apply to the BOC affiliate.[5]

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[5] Section 272(e)(4) also applies to interLATA "facilities." If a BOC attempted to lease its facilities to its affiliate for the affiliate to use to provide in-region interLATA services, that would create precisely the same dangers of discrimination and cross-subsidization as would the direct provision of services to its affiliate, and thus likewise falls within section 272(a)'s prohibition. A BOC may, by contrast, sell interLATA facilities to its affiliate, but only if unaffiliated carriers are given the same opportunity to purchase them and the BOC chooses the buyer that offers the best price. See 47 U.S.C. § 272(c)(1) (BOC may not discriminate between affiliated and unaffiliated entities "in the provision or procurement of . . . facilities").

3. **The Act's purposes.** Finally, the two RBOCs' reading of section 272(e)(4) would defeat the central purposes of section 272 by enabling them to do precisely what that section is designed to prohibit -- as their own motion and affidavits before the Court of Appeals confirmed was their intention. The two RBOCs stated there that they intended to deploy "network facilities, skilled workforces, and related support systems that are currently used to provide local telephone service, . . . in combination with newly constructed facilities, for the provision of long-distance service." See RBOC Motion, p. 5. They would thus have BOC employees design and engineer a long-distance network customized to their affiliate's business strategies and on an integrated basis with their monopoly local exchange businesses. This joint activity would be the essence of discrimination, because no other carrier would be able to plan, construct, engineer, and integrate its long-distance network with the BOC's exchange network in these ways.[6] Further, by using many of the same facilities, land, and systems, and the same "skilled work force" to "manag[e] local and long distance facilities alike,"[7] the BOCs would create a massive pool of actual and claimed joint and common costs that would render asserted cost allocations necessarily arbitrary and cross-subsidies a certainty.

The MFJ made no distinction between wholesale and retail provision of long-distance services by BOCs; it prohibited both. In this regard, the Public Notice asks whether the concerns of discrimination and cross-subsidization are less applicable to wholesale than to

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[6] It is no answer to say that the BOCs will also sell the resulting long-distance services to other carriers on the same terms and conditions as to their affiliate. The entities that would have an interest in obtaining such services from a BOC would be resellers, not AT&T, MCI, Sprint, Worldcom, and the many other carriers who have constructed their own facilities and who would offer services to resellers in competition with the BOC. As to those carriers, the BOC arrangement would be patently discriminatory.

[7] See Declaration of James G. Cullen, p. 2 (attached to RBOC Motion).

retail provision of long-distance services. To the contrary, they are especially applicable in the wholesale context, as the two RBOCs' stated plans vividly illustrate. The likelihood of discrimination and cost misallocation will be particularly high, and particularly difficult to detect, if a BOC engages in the joint construction, engineering, and operation of local, access, and long distance facilities, as opposed to the BOC's affiliate providing retail long-distance service as a reseller of an unaffiliated carrier's services, or by constructing its own facilities.

The Public Notice also asks whether the same risks are present when the BOC provides access or unbundled network elements to its affiliate. The risks that the BOC will discriminate, or otherwise act anticompetitively, in providing access or network elements to its affiliate are certainly substantial. However, those same risks would be present even in the absence of an affiliate relationship. Because sections 251 and 252 do not require a BOC to provide network elements through a separate affiliate, the BOC has the opportunity to cross-subsidize and otherwise discriminate against its competitors when it provides access services and network elements directly. Thus, even if the structural separation requirements operated perfectly to prevent anticompetitive abuse between the RBOC and its affiliate -- as they can not -- the BOC could still discriminate through the provision and maintenance of facilities (including cross-subsidization) in its direct provisioning of local exchange services to end users. Likewise, a BOC can manipulate its access offerings improperly to advantage its long distance affiliate. These dangers are inherent in a BOC's provision of its traditional exchange and exchange access offerings. By contrast, section 272 prohibits a BOC from directly providing interLATA service and requires that any such service be provided through a structurally separate affiliate, precisely to minimize those risks in connection with a BOC's future provision of interLATA services. Permitting the BOC to integrate within the operating company the provision of long-distance

services with the BOC's monopoly services would eviscerate those structural separation requirements, and create additional opportunities for the very discrimination and cross-subsidization that those requirements were designed to inhibit.

Indeed, their plan would turn the separate affiliate requirement into a farce. Because the Act permits a BOC to market and sell its affiliate's long distance service (see 47 U.S.C. § 272(g)(2)), and because each petitioner proposes also to "place the construction, ownership, and operation of its long distance network" within the BOC,[8] these BOCs would be designing, developing, and engineering the very interLATA services and facilities that BOC personnel would then market both to retail and wholesale customers. There would be nothing left for the separate affiliate to do. No construction of the Act that would render meaningless one of its core requirements can possibly be correct.

CONCLUSION

The Commission should reaffirm its prior interpretation of section 272(e)(4).

Respectfully submitted,

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[8] See Declaration of James G. Cullen, p. 2 (attached to RBOC Motion).